Petition

NO. 81-762

Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BILLIE SOL ESTES

Petitioner,

VERSUS

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

QUESTION PRESENTED

That prosecutorial vindictiveness or bad faith on the part of the government in breaching a plea bargain agreement requires dismissal of additional charges or enforecement of the plea bargain agreement.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

NO.
(5th Cir. CA 79-5444, - 54777)

BILLIE SOL ESTES

Petitioner

VS.

THE UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Billie Sol Estes, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on May 28, 1981, and with respect to which opinion and judgment the United States Court of Appeals denied rehearing on August 7, 1981.

OPINION

The Decision of the United States Court of Appeals for the Fifth Circuit on original submission, by written opinion, affirmed a judgment of conviction of the trial court (A-1) concluding, inter alia, that the government did not violate

Rule 11e, Federal Rules of Civil Procedure, 18 U.S.C.A., and the defendant's rights when it (government) brought more serious charges against the defendant after it failed to honor a plea bargain agreement.

STATEMENT OF THE CASE

On the 18th day of October, 1979, the Petitioner appeared before the Honorable Eldon B. Mahon, United States District Judge for the Northern District of Texas, Fort Worth Division for the purpose of entering a plea of guilty to a one count information pursuant to that plea bargain agreement entered of record on such date.

Prior to such hearing, the Petitioner had been threatened with indictments against his brother and daughter in the event he did not enter a plea of guilty.

Thereafter, the Honorable Assistant United States Attorney for the Northern District of Texas, James A. Rolfe, and counsel for Petitioner Estes, G. Brockett Irwin, engaged in several conversations concerning the willingness of the United States Parole Commission to approve the recommendation of a reduction in time on Petitioner Estes' parole as a condition for Petitioner Estes' entering the first plea bargain agreement. The Petitioner Estes, on entering the plea bargain agreement, relied on the representations made to Assistant United States Attorney Rolfe by Dr. William E. Amos of the United States Parole Commission wherein he stated that the Parole Commission would approve paragraph 3 of the plea bargain agreement.

Prior to entering the above-referenced plea bargain agreement, the Assistant United States Attorney, James A. Rolfe, had reviewed all the evidence contained in the government's file with respect to the various and multitudinous cases being

considered against the Petitioner Estes; he was familiar with the evidence and the nature of the allegations that the government could or would prosecute against Petitioner Estes; and in view of the totality of circumstances, was of the opinion that the result to be accomplished by the plea bargain agreement was just, fair, and reasonable.

Additionally, because of conversations that the United States Attorney had with a representative of the United States Parole Commission, the Petitioner and the government entered a second plea bargain agreement for the singular purpose of accommodating the requirements of the Parole Commission and protecting the rights of Petitioner Estes.

Subsequent to entry of the second plea bargain agreement, and subsequent to the arraignment hearing held on October 18, 1978, the United States Attorney, despite his agreement by the terms of the plea bargain agreement to recommend approval of same to the United States Parole Commission, withdrew his approval of his own plea bargain agreement in the *Dallas Times Herald* newspaper by saying that if he were the Parole Commission he wouldn't approve the terms of the plea agreement:

> "Frankly, I'm getting some static from the Parole Commission on this (the plea bargain) - they think I might have put undue pressure on them. That might be, but I don't think so," Mighell said.
>
> "If Amos or other higher-ups in the commission recommend that Estes serve more than 15 months, then so be it," said Mighell. "Frankly, that's what I would do if I was in their place. We are ready to go to trial if Estes withdraws his plea."

This explicit denouncement of the plea bargain by the United States Attorney had the effect of causing the United States Parole Commission to treat the Estes parole revocation

as a case of original jurisdiction, thus ultimately leading to refusal of the Parole Commission to approve the plea bargain agreement and to the withdrawal by Petitioner of his plea of guilty on the 26th day of January, 1979.

Thereafter, in retaliation for the Petitioner's withdrawal of his plea of guilty to the one count information, the government procured four indictments (CR 3-79-44; CR 3-79-45; CR 3-79-46; and CR 3-79-47) against the Petitioner, thus increasing his exposure of incarceration from five years as contemplated by the plea bargain agreement to a period of time in excess of one hundred and eight years.

Consequently, a Motion to Dismiss and Plea in Bar of Prosecution was filed by the Petitioner, a hearing was held thereon on the 3rd day of May, 1979, which Motion to Dismiss was overruled.

REASONS FOR GRANTING THE WRIT

Petitioner's challenge of the additional charges contained in the indictment is based on the proposition that Santabello sanctions a remedy of dismissal when the government breaches its plea bargain agreement. *Santabello v. New York*, 404 U.S. 257 (S. Ct. 1971). Otherwise, the accused can have no confidence in the plea bargaining process, thus, effectively, negating the viability of the plea bargaining process.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the opinion of the United States Court of Appeals for the Fifth Circuit on that question alone.

Respectfully submitted,

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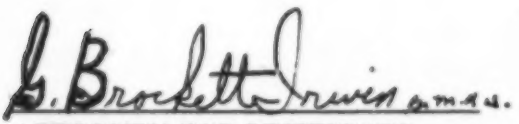

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was served upon the Assistant United States Attorney, Federal Courthouse Building, 1100 Commerce Street, Dallas, Texas 75242, by United States Mail on this the 9th day of October, 1981.

G. Brockett Irwin per m 9 5

G. Brockett Irwin

APPENDIX

PERMANENT

UNITED STATES v. HORTON

UNITED STATES of America,
Plaintiff-Appellee,

v.

Raymond K. HORTON and Billie Sol Estes,
Defendants-Appellants.

Nos. 79-5444, 79-5477.

United States Court of Appeals,
Fifth Circuit.

Unit A

May 28, 1981.

Defendants were convicted in the United States District Court for the Northern District of Texas, Robert M. Hill, District Judge, of conspiracy to defraud the United States by concealing assets from the Department of the Treasury and one defendant was also convicted of creating a scheme and artifice to defraud and to obtain money by means of false pretenses, and they appealed. The Court of Appeals, Garza, Circuit Judge, held that: (1) Government satisfied burden of showing by proponderance of the evidence that a conspiracy existed and that defendants were members of it, and thus conversations of a codefendant were admissible against the other; (2) trial court did not abuse its discretion in denying motion for severance; (3) there was no violation of the Speedy Trial Act; (4) trial court did not abuse its discretion in denying

motion for new trial on allegation of juror prejudice; and (5) issue as to whether punishment of one defendant had been enhanced without his being present and without a hearing was to be raised initially in trial court on motion for reduction of sentence.

Affirmed and remanded with instructions.

1. **Conspiracy key 47(1)**

In order for court to find that defendant was member of a conspiracy, Government must show beyond reasonable doubt, if only by circumstantial evidence, that a conspiracy existed, that defendant knew of it and that he intended to associate himself with its objectives.

2. **Criminal Law key 423(1), 427(2)**

Before coconspirator's statements can be considered by a court, Government must show by preponderance of the evidence, independent of those conversations, that a conspriacy existed, that coconspirator and defendant were members of that conspiracy, and that the statements were made during course of and in furtherance of the conspiracy.

3. **Conspiracy key 40.1**

Mere association with someone involved in a criminal enterprise is insufficient to prove participation in a conspiracy.

4. **Criminal Law key 427(5)**

In prosecution for conspiracy to defraud the United States by concealing assets from the Department of Treasury, Government satisfied its burden of showing by preponderance of the evidence that a conspiracy existed and that coconspirator and defendant were members of it, and thus coconspirator's

conversations were admissible and their believability became matters for jury to weigh and accept or reject. 18 U.S.C.A. §§ 2, 371.

5. Criminal Law key 428

Trial court did not fail to make determination as to admissibility of coconspirator's statements even though it did not specifically say that there was sufficient independent evidence of the conspiracy and that defendant and coconspirator were involved in it.

6. Criminal Law key 1038.1(1)

Where no objection is made at time of instruction, Court of Appeals may reverse only if plain error exists.

7. Criminal Law key 1038.2

Although trial court, in conspiracy prosecution, could have included instruction cautioning that a jury could only determine an alleged coconspirator's involvement from evidence of his own acts and statements, absence of such instruction did not prejudice either defendant and did not amount to plain error such as would have required reversal of defendant's conviction.

8. Criminal Law key 620(4)

Granting or denial of motion for severance is in discretion of trial court.

9. Criminal Law key 620(3)

Severance should only be granted if defendant can show that he was unable to obtain a fair trial without severance and that he can demonstrate compelling prejudice which trial court

could not alleviate.

10. Criminal Law key 620(5)

Severance is allowable when antagonistic defenses are present, but the conflict must reach a point where the defenses are irreconcilable and mutually exclusive.

11. Criminal Law key 622(2)

Defenses of codefendants in conspiracy prosecution were not antagonistic such as would have permitted granting of severance.

12. Criminal Law key 422(2), 824(1)

No undue prejudice attached to defendant because of mentioning of coconspirator's guilty plea, and fact that trial court may not have given a specific instruction as to effect of the guilty plea on both defendants did not amount to reversible error since apparently no such instruction had ever been requested and there were no additional aggravating circumstances that might have forced trial court to give such a specific instruction on its own.

13. Criminal Law key 622(2)

Trial court did not err in refusing to grant severance due to trial court's excusal of jurors that were not specifically prejudiced against defendant but were possibly prejudiced against codefendant.

14. Criminal Law key 31

There was no prosecutorial vindictiveness or bad faith by Government's threatening to bring indictments against members of defendant's family or by bringing of more serious

charges against defendant after he had decided not to plead guilty to lesser charge, nor did Government breach plea agreement.

15. Criminal Law key 273.1(2)

There is no violation of defendant's rights when the Government brings more serious charges against defendant after he has decided not to plead guilty to a lesser charge, provided defendant knew that those more serious charges existed at time of the plea bargain.

16. Criminal Law key 577.2

There was no violation of Speedy Trial Act and, even if there had been a violation, dismissal would not have been required since that sanction did not become effective until over a year after trial on the case began. 18 U.S.C.A. §§ 3161-3174, 3162, 3162(c).

17. Jury key 97(1)

Determination of existence of juror prejudice is within sound discretion of trial court.

18. Jury key 99(1)

Each claim of juror prejudice must turn on its facts and, to satisfy his burden, defendant must show actual identifiable prejudice attributable to publicity surrounding trial on part of member of jury.

19. Criminal Law key 923(2)

Trial court did not abuse its discretion in denying defendant's motion for new trial on allegation of juror prejudice where trial judge failed to find any prejudice in publicity to

which juror allegedly had been exposed and where the juror himself was not able to point to any specific publicity during trial.

20 Criminal Law key 1044.1(1)

Defendant's allegation that his punishment had been enhanced without his being present and without a hearing when, in response to Government's motion, trial court ordered defendant's sentence to run consecutively to any sentence he might receive as result of parole revocation was to be raised initially in trial court on motion for reduction of sentence. Fed. Rules Cr. Proc. Rule 35, 18 U.S.C.A.

Appeal from the United States District Court for the Northern District of Texas.

Before RUBIN and GARZA, Circuit Judges, and SUTTLE *, District Judge.

GARZA, Circuit Judge.

In the early 1960's Billie Sol Estes was convicted of tax fraud and served a number of years in prison. One of the conditions of his parole from prison was that he would not engage in any promotional activities. Estes still has a federal tax liability which numbers in the tens of millions of dollars.

In the present case, Estes was convicted of one count of creating a scheme and artifice to defraud and to obtain money by means of false pretenses in violation of 18 U.S.C. §1341. He was sentenced to five years on this conviction. At the same time, Estes and the appellant Raymond K. Horton were

*District Judge for the Western District of Texas, sitting by designation.

cealing assets from the Department of the Treasury in violation of 18 U.S.C. §§371 and 2. Estes was sentenced to a term of five years to run consecutively to the sentence in the case mentioned above. Horton was sentenced to three years confinement and a fine of $10,000. On the same day as sentencing, Estes was taken into custody on a warrant for violation of his parole.

This basis of the first conviction involved a transaction engineered largely by Estes to purchase an electronics company with other people's money. The appellant Horton was not involved in any way in this case. The purchase plan in itself would have been no grounds for criminal action except that Estes and a woman named Sue Goolsby, who later pled guilty, apparently forged one of the investor's signatures on financial statements, guarantees and lease agreements. In addition to that, Estes persuaded another investor to contribute a sizable amount of money in a petroleum company, after which the funds were diverted to infuse the electronics company with much needed cash. This same investor later made a loan to this electronics firm. He never received any return whatsoever on his investment.

In the concealment of assets case, in which Horton and Estes were convicted of conspiracy, the government alleged that Horton and Estes had been involved in ventures which funneled money to Estes without the knowledge of the Internal Revenue Service. The government contended that Estes was concealing these funds to prevent the IRS from obtaining a portion of the income to offset the huge tax liability of Estes. Horton was a successful businessman who had made his money in oil but was attempting to branch out into other areas of business. At the time of his difficulties with Estes and the government, Horton, was, at least on paper, a multimillionaire.

Upon Estes' release from prison in 1971, Horton discussed working with Estes on business transactions and later hired

Estes to help work out deals solely for Horton's benefit. Horton paid Estes a salary of about $700 a month. Horton entered certain business arrangements in which Estes had assisted him, and Horton desired to give Estes a percentage of any profit at some later date when such an arrangement would be legal for Estes. Horton also entered an agreement with Estes' brother, Dr. John Estes, in which the latter would receive upon Horton's death, one-half of that amount of Horton's estate which exceeded three million dollars. John Estes then place this right in a trust for the benefit of Billie Sol Estes' children. The evidence clearly shows that such an arrangement standing alone was completely legal, although Horton's attorney believed it did not amount to good business sense.

In 1974 and 1975, Horton purchased a chemical cleaning manufacturing business. This firm was to assemble high pressure chemical cleaners that would clean oil field equipment. While involved in this business, Horton directed that certain monies from the sale of the cleaners, which incidently were non-existent, be given to Billie Sol Estes in hundred dollar denominations. The man delivering this money to Estes, Frank Fuell, was told by Horton that Estes would then convey the money to a man named Barrett as a sales commission. Fuell repeatedly asked for Barrett's social security number for tax and accounting purposes, but Horton never gave it to him. Barrett testified for the government during which he stated that he did receive partial payment on his commission, but that it had been paid by check.

In 1977, the government decided to investigate Estes' financial statements, which Estes contended were very minimal. Government agents, acting as potential investors with shady, mafia-like connections, contacted Estes to discuss certain business deals. The government agents recorded their conversations with Estes, both personally and by telephone. A number of these tapes or parts thereof were introduced into evidence at the trial. In these tapes, Estes told the government agents that he had ownership rights in

Horton's business, that he knew how to handle Horton and that he in effect controlled Horton. Estes also told the agents that his actual worth was very high but that his money was kept in the name of someone else since he was not allowed to have it in his name. Estes also promised to obtain a contract from Horton in which Horton would pledge fifth one percent of his company, of which Estes claimed he owned one-half. In this transaction, Estes had told the government agents not to talk to Horton about the deal and that Estes could take care of it. When the agents subsequently called Horton, however, Horton told them that Estes could sign no contract and that nothing could be worked out until Horton agreed. The contract was eventually signed by Horton placing the collateral in the name of a nominee.

Both appellants now raise a number of grounds of error. Horton contends that the evidence was insufficient to convict him of conspiracy, that the trial court erred in failing to make a determination as to the admissability of statements made by Estes, that the trial court erred in its jury charge and that the trial court's failure to order a severance was error. Estes claims on appeal that his case should have been dismissed either for prosecutorial vindictiveness, violation of the Speedy Trial Act or for refusing to enforce a plea bargain agreement. Estes also contends that he was denied a fair trial since one of the jurors was allegedly prejudiced by the media and that the court erred in amending his sentence outside of his presence and without a hearing.

Horton and Estes were convicted of conspiracy to defraud the United States pursuant to 18 U.S.C. §371. 1/ Specifically,

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1/ 18 U.S.C. §371 makes it a crime:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy. . . .

the two were accused of impeding the Department of the Treasury from collecting back taxes by means of the concealment of assets. Only Horton challenges the sufficiency of the evidence. The evidence is insufficient when a reasonably minded jury must necessarily entertain a reasonable doubt as to the defendant's guilt under the evidence. ***United States v. Ocanas,*** 628 F.2d 353, 360 (5th Cir. 1980).

[1] In order to find that Horton was a member of the conspiracy, the government must have shown beyond a reasonable doubt, if only by circumstantial evidence, that a conspiracy existed, that Horton knew of it and that he intended to associate himself with the objectives of the conspiracy. ***United States v. Caicedo-Asprilla,*** 632 F.2d 1161, 1166 (5th Cir. 1980). In the instant case, there can be no doubt that Estes' conversations with the agents, which are preserved on tape, comprise evidence that Horton knew that Estes possessed large amounts of cash and even owned half of one of Horton's companies.

[2] However, standing alone, all the damaging evidence of Estes' conversations are inadmissible. Before Estes' statements could ever be considered by a court, the government must show by a preponderance of the evidence, independent of those conversations, that a conspiracy existed, that Estes and Horton were members of that conspiracy and that the statements were made during the course of and in furtherance of the conspiracy. ***United States v. Ocanas,*** 628 F.2d at 359; ***United States v. James,*** 590 F.2d 575, 581 (5th Cir. 1979) (en banc), ***cert. denied,*** 442 U.S. 917, 99 S.Ct. 2836, 61 L. Ed. 2d 283 (1979). ***See also United States v. Ricks,*** 639 F.2d 1305 (5th Cir. 1981).

[3] In the present case, the government barely met this threshold requirement. In its appellate brief, the government dovotes one page out of twenty four pages of argument to the issue of the sufficiency of the evidence in a trial whose transcript exceeds four thousand pages. The government's main

thrust seems to be that the two individuals were involved in a "quite intimate business relationship," implying that Horton must have known of any illegalities committed by Estes. 2/ That factor alone is too weak to convict a man of conspiracy to defraud the United States. Mere association with someone involved in a criminal enterprise is insufficient to prove participation in a conspiracy. *United States v. Gutierrez*, 559 F.2d 1278, 1280 (5th Cir. 1977). Horton's agreement with Dr. John Estes to leave part of his estate to the latter is hardly evidence of a conspiracy to defraud the government. Horton's desire to give Estes a share of the profits at some undetermined future time is hardly evidence of a conspiracy to defraud the government. Horton's possible involvement in selling allegedly nonexistent chemical cleaners to private individuals is hardly evidence of a conspiracy to defraud the government.

2/ Although we find that the government in this case presented enough evidence to allow the introduction of a coconspirator's statements at trial this court the district court and the attorneys for the United States should always remain cognizant of the words of Justice Jackson in *Krulewitch v. United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949) (Jackson, J., concurring). In a concurrence joined by Justices Frankfurter and Murphy, Justice Jackson referred to conspiracy as an "elastic, sprawling and pervasive offense." *Id.* at 445, 69 S.Ct. at 719, 93 L.Ed. at 795. Conceding that the basic principal of conspiracy is necessary in modern criminal law, Justice Jackson stated that "even when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case." *Id.* at 449, 69 S.Ct. at 721, 93 L.Ed. at 797. In our case today, the government's evidence of a conspiracy minmally met the preponderance of the evidence test which is required to allow coconspirators' statements to go to a jury. We would only caution those who present indictments to grand juries by echoing Justice Jackson's remarks that a court should not strain "to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction." *Id.* at 457, 69 S.Ct. at 724, 93 L.Ed. at 801.

[4] In spite of the weakness of the government's evidence, Horton's orders for Frank Fuell to give Estes large amounts of cash on two occasions, regardless of Horton's claim that Estes did not keep the money, reasonably could show by circumstantial evidence an agreement between the two to divert money to Estes without the government's knowledge. The introduction of that evidence could then reasonably allow the jury to infer criminal motives from the otherwise innocent acts mentioned above. Thus, we conclude that the government satisfied the burden of showing by a preponderance of the evidence that a conspiracy existed and that Estes and Horton were members of it. Estes' conversations, therefore, were admissible and their believability along with Estes' and Horton's testimony at trial became matters for the jury to weigh and accept or reject.

[5] Horton's second challenge regards the trial court's alleged failure to make a determination as to the admissibility of statements of an alleged coconspirator, namely Estes. During the testimony of the main government witness, the judge ruled that the government was coming forward with evidence showing a relationship between Horton and Estes. At the close of the evidence, Horton sought a judgment of acquittal, based largely on the hearsay evidence. The judge overruled this motion. Although the trial court did not specifically say that there was sufficient independent evidence, it is clear that his comments during the government's case and his overruling of the defendant's various motions involving the hearsay objection, show that the trial court found there to be sufficient independent evidence of the conspiracy and that Horton and Estes were involved in it.

[6] Horton also alleges that the trial court erred in failing to give a certain charge. No objection was made at the time of the instruction, and so this court may reverse only if plain error exists. *United States v. Berrojo*, 628 F.2d 368, 370 (5th Cir. 1980). The trial court gave a completely adequate

instruction on the law of conspiracy. In fact, the trial court adhered to the instructions recommended by the District Judges Association For The Fifth Circuit in its manual on pattern jury instructions. ***See Pattern Jury Instructions for the Fifth Circuit,*** Offense Instruction 3A (March1, 1979). Horton concedes this point but contends that the trial court failed to give an instruction which he alleges is also in the Fifth Circuit Pattern Jury Instruction manual.

[7] The Fifth Circuit pattern jury instruction to which Horton refers no longer exists. Horton does contend, though, that included in that instruction was a charge which cautioned that a jury could only determine an alleged coconspirator's involvement from evidence of his own acts and statements. The trial judge in this case did not include such a charge. Neither defendant objected to this omission at trial. Although the trial court could have included such an instruction, its absence did not prejudice either defendant and does not amount to plain error. ***See United States v. Calarco,*** 424 F.2d 657, 661 (2d Cir. 1970), ***cert. denied,*** 400 U.S. 824, 91 S. Ct. 46, 27 L.Ed.2d 53 (1970).

Horton finally contends that the trial court erred in failing to grant a severance, which was requested a number of times throughout the trial. Horton claims that the severance should have been granted for any one or all of four reasons: 1) antagonistic defenses; 2) the trial court's excusal, over objection, of jurors who might have been prejudiced against Estes but knew nothing of Horton; 3) references to Estes' prior guilty plea involving some of the charges in this case; 4) introduction of hearsay evidence contrary to ***United States v. James.***

[8-11] It must be remembered that the granting or denial of a motion for severance is in the discretion of the trial court, ***United States v. Salomon***, 609 F.2d 1172, 1175 (5th Cir. 1980), and appellate courts are hesitant to second guess a trial court's refusal to grant a severance. ***United States v. Marino***,

617 F.2d 76, 83 (5th Cir. 1980). Severance should only be granted if the appellant can show that he was unable to obtain a fair trial without a severance and that he can demonstrate compelling prejudice which the trial court could not alleviate. *United States v. Crawford*, 581 F.2d 489, 491 (5th Cir. 1978). Severance is allowable when antagonistic defenses are present, but the conflict must reach a point where the defenses are irreconcilable and mutually exclusive. *Id.* The defenses in this case never reached that level. One indication of the lack of antogonistic defenses was that both defendants testified and denied culpability. *See United States v. Andrew*, 606 F.2d 549, 550 (5th Cir. 1979). A thorough reading of the record convinces this court that the defenses were not antagonistic and, in fact, were extremely consistent.

[12] Horton's challenge concerning Estes' guilty plea is equally not grounds for severance. Estes had entered a plea bargain agreement earlier in the litigation but withdrew it upon recommendation of the court. The government never introduced any evidence regarding this guilty plea due to the court's ruling that it was inadmissible. It was originally mentioned in Estes' opening argument and mentioned again by Horton's counsel when questioning members of Estes' family. The trial judge also instructed the jury as to the presumption of the defendants' innocence and that each defendant was to be tried separately on only the evidence against him. This court is satisfied that no undue prejudice attached to Horton because of the mentioning of Estes' guilty plea. The fact that the trial court may not have given a specific instruction as to the effect of the guilty plea on both defendants does not amount to reversible error since apparently no such instruction was ever requested and there were no additional aggravating circumstances that might have forced the trial court to give such a specific instruction on its own. *See United States v. DeLucca*, 630 F.2d 294, 299 (5th Cir. 1980).

[13] The court has already ruled that the introduction of Estes' statements was correct and, thus, cannot be a ground for severance. This court finds equally unacceptable Horton's argument regarding the excusal of jurors that were not specifically prejudiced against Horton but were possibly prejudiced against Estes. A defendant does not have a right to a specific juror but only to a fair and impartial one. Since the two defendants were rightly tried together, the occurrence in this case regarding such jurors is a potential and often likely one. We find no error in the court's refusal to grant a severance on this point.

Estes contends that his motion to dismiss and plea in bar of prosecution should have been granted by the government on the grounds of prosecutorial vindictiveness and impropriety. Estes' basis for this charge is that the government threatened the bringing of indictments against members of his family. Estes also relies upon the government's agreement not to seek indictments in return for his guilty plea, that the government did not uphold its part of the bargain by using its best efforts to obtain approval of the agreement from the United States Parole Commission and that the government then vindictively caused the return of a number of indictments against him in place of the one-count guilty plea.

[14, 15] This court finds that there was no prosecutorial vindictiveness or bad faith. First, there is no violation of the defendant's rights when the government brings more serious charges against the defendant after he has decided not to plead guilty to a lesser charge provided the defendant knew that those more serious charges existed at the time of the plea bargain. *Bordenkircher v. Hayes*, 434 U.S. 357, 360, 98 S.Ct. 663, 665, 54 L. Ed. 2d 604, 609 (1978); *United States v. Ocanas*, 628 F.2d at 358. In the instant case, Estes was well aware at the time of his plea agreement of the existence of the charges that were inevitably brought against him. This court finds no impropriety in the government's warnings that members of his family could be indicted as well.

As to the government's agreement *vis a vis* the Parole Commission, the government agreed that it would:

> recommend to the United States Parole Commission that Billie Sol Estes' parole be revoked for technical violations of the terms of his parole for a period commencing with the beginning date of any sentence imposed hereunder and ending no later than the date of the expiration of his present parole, and will further recommend that the parole not be revoked for a period of time commencing with the date that Billie Sol Estes was released from the Federal Corrections Institution; and that Billie Sol Estes be sentenced after the United States Parole Commission has acted on this recommendation. . . .

The plea bargain also stipulated that if the Parole Commission failed to accept and act on the United States Attorney's recommendation, the agreement would be null and void. The government also agreed not to object to any release on parole of Estes. The government did make contact with the Parole Commission on this matter according to the plea agreement. The Parole Commission, however, decided to delay any decision until after the sentencing of Estes. The district court then held that the agreement was unenforceable since the government could not bind the Parole Commission. The court then allowed Estes to withdraw his plea, which he did. The government upheld its part of the agreement, and this court finds no breach of that agreement.

[16] Estes' alternative challenge on this point concerns an alleged violation of the Speedy Trial Act, 18 U.S.C. §§3161-3174. This court finds no violation of the Speedy Trial Act, and further finds that even if there had been a violation, dismissal would not be required since that sanction found in 18 U.S.C. §3162 did not become effective until over a year after the trial on this case began in June of 1979. *See* 18 U.S.C.

§3162(c) (Sanctions imposed for violations of the act "become effective and apply to all cases commenced by arrest or summons, and all informations or indictments filed, on or after July 1, 1980.")

Estes' second alternative challenge on this point concerns alleged error by the court in refusing to enforce the plea bargain. Estes contends again that the government did not use its best effort to satisfy the terms of the agreement. A thorough review of the record convinces this court that the government did correspond with the Parole Commission to effectuate the terms of the agreement. These efforts by the government resulted in a recommendation by the commissioner of the Parole Commission, Dr. William E. Amos, that the Parole Commission follow the recommendation of the government according to the plea agreement. Therefore, Estes' challenges regarding his motion to dismiss and plea in bar of prosecution are without merit.

Estes next contends that the trial court should have granted his motion for a new trial on the ground of juror misconduct. One of the jurors contended that he was influenced by the media to such an extent that he believed he was the only one who considered Estes not guilty. Throughout the trial, the court had admonished the jurors not to read or listen to news accounts of the trial. A hearing was held on the motion for new trial. The trial court examined all the matters raised at the hearing and determined that no specific evidence was presented which could indicate grounds for influencing the juror. Finding no such evidence, the court determined that there had been no actual prejudice and denied the motion for a new trial.

[17-19] The determination of the existence of juror predudice is within the sound discretion of the court. ***United States v. Goodman***, 605 F.2d 870, 882 (5th Cir. 1979). Each claim of juror prejudice must turn on its own facts, *id.*, and to satisfy his burden the defendant must show an actual identifiable

prejudice attributable to publicity surrounding the trial on the part of a member of the jury. *Mayola v. State of Alabama*, 623 F.2d 992, 996 (5th Cir. 1980). In the instant case, the trial judge discounted the testimony of the juror and failed to find any prejudice in the publicity to which Estes referred during the hearing. The juror himself was not able to point to any specific publicity during the trial. On this basis, we find that there was no abuse of discretion by the trial court in denying the motion for a new trial. 3/

Estes' last challenge concerns alleged error in sentencing by the trial judge. As already mentioned, the trial judge sentenced Estes to consecutive terms of five years. On the same date, Estes was taken into custody on a parole violator's warrant. The government then filed a motion seeking a clarification as to whether the above sentence would run concurrently or consecutively to any sentence Estes might receive upon the revocation of his parole. Shortly thereafter, the trial court ordered that Estes' ten-year sentence shall run consecutively to any sentence he might receive as a result of parole revocation. Estes contends on appeal that his punishment has been enhanced without his being present and without a hearing. Estes points out that the warrant for his parole violation was issued subsequent to his sentencing in this case. Further, the court's order clarifying this point was entered nearly one month after Estes was to report to the marshal's custody.

[20] Although this court believes that Estes may have a valid argument on this point, *see, e.g., Causey v. Civiletti*,

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3/ Additionally, under Rule 606(b) of the Federal Rules of Evidence, although a juror may testify as to whether extraneous prejudicial information was improperly brought to his attention, a juror is incompetent to testify as to the effect of anything upon his mind as influencing him to assent to the verdict. Regardless, then, of whether any information was improperly brought to the juror's attention, Rule 606(b) would render incompetent his testimony that he was influenced by newspaper accounts.

621 F.2d 691, n.2 (5th Cir. 1980) (in the absence of dispositive language in the sentencing order, there is a general presumption that sentences are to run concurrently); *Schultz v. United States*, 384 F.2d 374, 375 (5th Cir. 1967) (increasing a sentence after defendant has commenced to serve it is a violation of double jeopardy), we believe that the issue should be raised initially in the trial court on a motion for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure. 4/ *See United States v. Weiner*, 418 F.2d 849, 851 (5th Cir. 1969).

In summary, after a thorough reading of the record and examination of the exhibits, this court finds no error in the conviction of the appellants and affirms the trial court's judgment. The case is remanded solely to allow Estes to present his motion for reduction of sentence pursuant to Rule 35.

AFFIRMED AND REMANDED WITH INSTRUCTIONS.

West Publishing Company,

4/ **Rule 35 of the Federal Rules of Criminal Procedure provides in pertinent part:**

> **The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT A

NO. 79-5444

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

RAYMOND K. HORTON, and
BILLIE SOL ESTES,
Defendants-Appellants.

Filed August 7, 1981

Appeals from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING
(August 7, 1981)

Before RUBIN and GARZA, Circuit Judges, and SUTTLE *, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Raymond K. Horton in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

*District Judge for the Western District of Texas, sitting by designation.

/s/ Illegible
United States Circuit Judge,

CLERK'S NOTE:
See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate

Opposition

Office-Supreme Court, U.S.
FILED
DEC 28 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-762

In the Supreme Court of the United States

OCTOBER TERM, 1981

BILLIE SOL ESTES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government breached a plea agreement with petitioner or acted "vindictively" when it obtained the indictments at issue in this case.

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BILLIE SOL ESTES, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-19) is reported at 646 F. 2d 181.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1981. A petition for rehearing was denied on August 7, 1981 (Pet. App. A-20 to A-21). The petition for a writ of certiorari was filed on October 13, 1981, and is therefore out of time under Rule 20 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of conspiring to defraud the United States by obstructing

the Department of Treasury in the collection of income taxes, in violation of 18 U.S.C. 371 and 2 (Case No. CR 3-79-46), and of mail fraud, in violation of 18 U.S.C. 1341 (Case No. CR 3-79-44). He was sentenced to two consecutive five-year terms of imprisonment.[1]

The events that preceded the return of the indictments against petitioner are as follows. In the early 1960's, petitioner was convicted of tax fraud and served a number of years in prison. He was released on parole in 1971. One of the conditions of his parole was that he would not engage in any promotional activities. Petitioner still has a federal tax liability in excess of $20 million (Pet. App. A-6 to A-7).

On October 18, 1978, knowing that the indictments involved in this case were ready for presentation to the grand jury, petitioner entered into a plea agreement with the United States (Pet. App. A-15). Under the terms of the agreement, petitioner was to enter a guilty plea to a one-count information charging him with conspiring to conceal assets from the Internal Revenue Service. In return, the government would drop further charges against him and forgo prosecuting various members of his family (Plea Agreement).[2] In addition, the government agreed to recommend to the United States Parole Commission (Plea Agreement 2)

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[1] Petitioner also was named in two other indictments. In Case No. CR 3-79-45, petitioner was charged with mail fraud, transportation of fraudulently obtained securities in interstate commerce, and conspiring to commit those offenses. The jury was unable to reach a verdict on any of those counts. The indictment in Case No. CR 3-79-47 charged petitioner with filing a false income tax return, in violation of 26 U.S.C. 7206(1). That indictment was dismissed prior to trial upon the motion of the government.

[2] "Plea Agreement" refers to the written plea agreement filed with the district court on October 18, 1978. "Arraignment Tr." refers to the transcript of the October 18, 1978, arraignment proceedings. "Jan. 26,

> that [petitioner's] parole be revoked for technical violations of the terms of his parole for a period commencing with the beginning date of any sentence [received as a result of the plea] and ending no later than the date of the expiration of his present parole, * * *; and that [petitioner] be sentenced after the United States Parole Commission ha[d] acted on [the] recommendation * * *.

The government further agreed not to object to petitioner's release on parole on any sentence imposed as a result of the guilty plea. The plea agreement was expressly conditioned upon acceptance by the Parole Commission of the government's recommendation. Failure by the Commission to act in accordance with the recommendation rendered the agreement null and void and gave petitioner the right to withdraw his guilty plea (Plea Agreement 2).

Following a hearing on the plea (Arraignment Tr. 3-37), the court accepted petitioner's plea of guilty to the charge contained in the information, but deferred final acceptance of the plea agreement pending review of that agreement and the presentence report (*id.* at 37-38). The court noted that petitioner retained the right to withdraw his guilty plea pending the court's acceptance or rejection of the plea agreement (*id.* at 38). On December 13, 1978, the Parole Commission declined to act on the government's recommendations until after petitioner had been sentenced (Hearing Tr. 80-81, 181, 197).

On January 26, 1979, the district court rejected the plea agreement as unenforceable, holding that the United States Attorney could not bind the Parole Commission and that the agreement therefore contained convenants that were

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1979 Tr." refers to the transcript of proceedings held on that date concerning the plea agreement. "Hearing Tr." refers to the May 3, 1979, hearing on petitioner's motion to dismiss the indictments.

beyond the power of the parties to perform (Jan. 26, 1979 Tr. 5). The court advised petitioner that he could withdraw his guilty plea if he so desired, and petitioner chose to withdraw his plea (*id.* at 6-7). The government thereafter obtained the indictments that are at issue in this case.

ARGUMENT

Petitioner claims (Pet. 4) that the government failed to honor its plea agreement and subjected him to vindictive prosecution. This claim is without merit.

Petitioner's contention that the government breached its plea agreement by failing to make the agreed recommendation to the Parole Commission is contradicted by the record. Following the entry of petitioner's guilty plea, both the United States Attorney and the Assistant United States Attorney handling the case contacted the Parole Commission on numerous occasions urging acceptance of the government's recommendation (Hearing Tr. 65-66, 112, 139-143, 153-154).[3] As a consequence, Dr. William Amos, the parole commissioner who supervised petitioner's parole, recommended in writing to the Commission that it accept the government's recommendation (*id.* at 164-168, 181). Dr. Amos testified that the government "made every effort" to get the Parole Commission to accept the plea agreement (*id.* at 162-163). Nonetheless, on December 13, 1978, the Commission, sitting en banc, declined to act upon the recommendation until after petitioner had been sentenced (*id.*

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[3]Prior to the entry of petitioner's plea, the government contacted the Parole Commission on several occasions in order to ascertain whether the plea agreement complied with Commission statutes and regulations. Both the United States Attorney and the Assistant United States Attorney handling the case believed the Parole Commission would accept the government's recommendation. However, neither they nor any member of the Parole Commission made any guarantees to that effect to petitioner (Hearing Tr. 65-69, 112-114, 146, 175-176).

at 80-81, 181, 197). Thereafter, the district court rejected the agreement and petitioner withdrew his guilty plea (Jan. 26, 1979 Tr. 5-7).

In support of his claim that the government breached its plea agreement with him, petitioner cites a newspaper article published in the *Dallas Times Herald* on October 21, 1978, in which the United States Attorney was reported as stating (Pet. 3):

> Frankly, I'm getting some static from the Parole Commission on this (the plea bargain)—they think I might have put undue pressure on them. That might be, but I don't think so * * *.
>
> If Amos or other higher-ups in the commission recommend that [petitioner] serve more than 15 months, then so be it * * *. Frankly, that's what I would do if I was in their place. We are ready to go to trial if [petitioner] withdraws his plea.

During the hearing on petitioner's Motion to Dismiss, however, the United States Attorney denied having made such a statement on the record to any reporter (Hearing Tr. 111-112). Moreover, the reporter to whom the statement allegedly was made was not subpoenaed to testify at the hearing (*id.* at 283). Thus, petitioner failed to establish either that the United States Attorney made the statement or that he took any other steps to discourage the Parole Commission from following his recommendation.

Nor did petitioner introduce any evidence that the newspaper article in question influenced the Parole Commission's decision. Dr. Amos, the only Commissioner who testified, stated that he had not seen the article until after he had made his recommendation to the Commission, and that

it therefore played no part in his decision (Hearing Tr. 168-170).[4] In sum, the record fully supports the finding of the court of appeals (Pet. App. A-16) that "[t]he government upheld its part of the agreement, and this court finds no breach of that agreement." There is no need for this Court to review that factual determination.

Moreover, even if there were merit to petitioner's claim that the government failed to honor its plea agreement, that purported failure did not cause petitioner to withdraw his guilty plea. Rather, petitioner withdrew his guilty plea because the district court refused to accept the plea agreement. Petitioner's reliance on *Santobello* v. *New York*, 404 U.S. 257 (1971), is therefore completely misplaced. There, the district court refused to allow the defendant to withdraw his guilty plea after the government breached its plea agreement. Here, by contrast, petitioner was allowed to withdraw his guilty plea after the district court rejected the plea agreement.

Nor was petitioner subjected to "vindictive" prosecution. The charges brought against petitioner had been prepared and scheduled for presentment to the grand jury before petitioner entered into the abortive plea agreement with the government. The situation therefore was no different than if the grand jury had indicted on several charges and the government had agreed to drop certain charges in return for

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[4]Petitioner also claims (Pet. 3-4) that the "explicit denouncement of the plea bargain" by the United States Attorney, as reported in the newspaper article, caused the Parole Commission "to treat [petitioner's] parole revocation as a case of original jurisdiction, thus ultimately leading to refusal of the Parole Commission to approve the plea bargain agreement." The record does not support this claim. At the hearing on petitioner's Motion to Dismiss, Dr. Amos emphatically rejected defense counsel's suggestion that the publicity the case had received triggered the decision to treat the case as one of "original jurisdiction"—that is, a case requiring consideration by the Commission sitting en banc rather than by a panel of three Commissioner (Hearing Tr. 74-75, 173-175).

petitioner's plea of guilty to other charges. See *Bordenkircher* v. *Hayes*, 434 U.S. 357, 361 (1978). Because the charges ultimately presented were those contemplated and openly acknowledged during the course of plea negotiations, there is not even a colorable claim that the government violated petitioner's due process rights when it brought those charges following the withdrawal of petitioner's guilty plea. *Bordenkircher* v. *Hayes, supra*, 434 U.S. at 360-361. See *United States* v. *Herrera*, 640 F. 2d 958, 962 (9th Cir. 1981); *United States* v. *Black*, 609 F. 2d 1330, 1333 (9th Cir. 1970); *United States* v. *Anderson*, 514 F. 2d 583, 588 (7th Cir. 1975); see also *United States* v. *Ocanas*, 628 F. 2d 353, 358 (5th Cir. 1980).[5]

---

[5]Petitioner also claims (Pet. 2) that the government threatened to indict his brother and daughter if he did not enter a guilty plea. At the time of the plea negotiations, investigations were pending against members of petitioner's family. The prosecutor advised petitioner's counsel that petitioner was the central target of the investigation and that if petitioner pleaded guilty he would recommend that the proposed charges against petitioner's relatives be dropped. Thereafter, at the insistence of petitioner's counsel, the plea agreement provided that various members of petitioner's family would not be prosecuted. Because of the inclusion of this provision, the agreement also contained a provision stating that petitioner was entering his plea because he was guilty of the offense charged in the indictment and for no other reason. We also note that, to the extent that an "offer during plea bargaining of adverse or lenient treatment for some person *other* than the accused" raises the danger of inducing a false guilty plea (see *Bordenkircher* v. *Hayes, supra*, 434 U.S. at 364 n.8), such concerns are not present here because petitioner withdrew his guilty plea.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorney

DECEMBER 1981

DOJ-1981-12